H&W Motor Express, Inc., Lin Rol Labor Industries, Inc. and Teamsters Local Union No. 41, Petitioner. Case 17-RC-9544

31 July 1984

## DECISION ON REVIEW AND DIRECTION OF ELECTION

## By Chairman Dotson and Members ZIMMERMAN AND HUNTER

On 12 October 1983 the Regional Director for Region 17 of the National Labor Relations Board issued his Decision and Direction of Election in the above-entitled proceeding. The Regional Director found that H&W Motor Express, Inc., herein H&W, and Lin Rol Labor Industries, Inc., herein Lin Rol, were joint employers and the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed by H&W and Lin Rol at the facility located at 4401 Gardner, Kansas City, Missouri, but excluding sales personnel, professional employees, guards and supervisors as defined in the Act.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, both H&W and Lin Rol filed timely requests for review of the Regional Director's decision. In their requests for review, both H&W and Lin Rol contend that they are not joint employers of the petitioned-for employees<sup>2</sup> but rather that the employees sought by the petition are solely the employees of Lin Rol, and have merely been assigned to H&W.<sup>3</sup> By telegraphic order dated 9 November 1983 the National Labor Relations Board granted both requests for review limited to the joint employer issue.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the entire record in this case, including the briefs of the parties, and makes the following findings.

<sup>1</sup> The Petitioner sought a unit of employees employed by H&W and Lin Rol asserting that they are joint employers of the employees performing warehouse and driver functions at H&W's Kansas City terminal.

Lin Rol is a labor broker providing experienced labor and truckdrivers to employers in 12 locations throughout the Midwest. Its corporate offices are located in St. Peters, Missouri, where it has been in business for approximately 3 years.

H&W Motor Express, Inc. is a common carrier which operates in an eight-state area throughout the Midwest. The Company's home office is in Dubuque, Iowa, from which it dispatches its long-haul road drivers.

The operations of H&W in Kansas City began in October 1982 when H&W purchased certain assets and took over certain operations from Kroblin Transportation, a competitor. At the time of the takeover, Lin Rol was providing service to Kroblin at a facility acquired by H&W, at issue herein. Kroblin had contracted with Lin Rol for Lin Rol to provide a terminal manager and five drivers to meet Kroblin's local transport needs. Rather than arrange for a new crew of employees on takeover of Kroblin, H&W executed an agreement with Lin Rol for the continued staffing of the terminal by Lin Rol employees.

The agreement executed between H&W and Lin Rol states, in part, that:

- 1. . . . [Lin Rol] shall furnish to [H&W] such drivers as [H&W] may require to operate motor vehicle equipment owned or leased by [H&W]. All drivers so furnished shall be competent, experienced, and satisfactory to [H&W]. . . .
- 2. . . . [Lin Rol] drivers shall . . . observe and comply with such safety regulations as [H&W], the Interstate Commerce Commission and/or Department of Transportation and/or the various states may from time to time require . . . . At the request of [H&W] and upon receipt of a written complaint specifying that an employee of [Lin Rol] has been dishonest, drunk, or reckless, resulting in a serious accident while on duty or the carrying of an unauthorized passenger, then [Lin Rol] shall remove such driver from the services of [H&W] and furnish a substitute as soon as it is reasonably possible to do so.

<sup>2</sup> Review was also sought as to the Regional Director's finding that employee Swift was nonsupervisory and should be included in the unit.

<sup>&</sup>lt;sup>3</sup> The Allied Services Division, Brotherhood of Railway and Airline and Steamship Clerks, Trade Handlers, Express and Station Employees, AFL-CIO, herein BRAC, was permitted to intervene based on the existence of a collective-bargaining agreement with Lin Rol. That agreement had covered the presently petitioned-for unit employees. At the hearing, BRAC concurred with H&W and Lin Rol that those entities do not constitute a joint employer.

<sup>&</sup>lt;sup>4</sup> Though the address has changed to 4401 Gardner Avenue, none of the parties disputes that this is the same local trucking operation formerly located on Liberty Street in Kansas City, Missouri.

<sup>&</sup>lt;sup>5</sup> The drivers at that terminal were covered by the Lin Rol-BRAC collective-bargaining agreement identified in fn. 3.

<sup>&</sup>lt;sup>6</sup> At the time of the hearing, the complement of employees provided by Lin Rol to H&W included the terminal manager and six short-haul city drivers. In addition, H&W has two of its own employees at the terminal. Both H&W employees are salesmen who are primarily responsible for soliciting new business and servicing existing accounts.

- 3. [Lin Rol] is the employer of drivers as are utilized by [H&W] and [Lin Rol] with respect to drivers furnished to [H&W] shall:
- (a-f) make all proper payments of wages, benefits, taxes, workmen's compensation, [etc.] and maintain required records.

6. [H&W] with respect to the drivers furnished by [Lin Rol] shall:

(a-d) maintain reports and records to comply with government regulations and idemnify [Lin Rol].

. . . .

9. The term of this agreement is indefinite and will run until cancelled by either party upon thirty (30) day's notice prior to the proposed effective date of termination.

The Kansas City facility is used in the following manner: H&W's road drivers deliver and pick up long-haul freight to and from the Kansas City terminal. The Lin Rol-supplied city drivers pick up and deliver local freight for transport within the city as well as for coordinated transport by road drivers to out-of-town destinations. The city drivers also deliver the long-haul freight, brought to Kansas City by the road drivers, to the freight's local Kansas City destination.

The terminal in issue is managed by William Gofta, a Lin Rol-supplied individual. Prior to H&W's takeover of Kroblin, Gofta acted in a similar capacity under contract from Lin Rol to Kroblin. Gofta is primarily responsible for the day-to-day operations at the facility. Gofta supervises the six Lin Rol-supplied city drivers on a daily basis: he assigns work; can independently assign overtime; can grant sick leave or time off; and can hire, discipline, suspend, and fire employees. Additionally, Gofta participates, on behalf of Lin Rol, in the administration of contract grievances involving Lin Rol and BRAC. Gofta also answers phones, forwards information, and processes paperwork.

Gofta is assisted by Bert Swift, a Lin Rol-supplied employee. Swift is primarily responsible for clerical work, but also implements Gofta's orders in the evening after Gofta has left.<sup>8</sup>

The Kansas City facility is apparently leased by H&W. All of the dock and office equipment is owned by H&W as are the vehicles driven by Lin Rol city drivers. The facility and equipment bear H&W signs. Gofta utilizes a business card which

identifies him as the terminal manager for H&W Motor Express. He is also listed in the H&W directory as the Kansas City "contact." Gofta speaks with H&W's central dispatch in Dubuque on a daily basis to coordinate freight transport. Gofta uses a gasoline credit card given to him by H&W, and he entertains potential H&W clients, for which he is reimbursed. He has attended at least one meeting conducted by H&W concerning operational procedures. He also acts as H&W's representative regarding customer complaints.

Gofta has, on occasion, signed H&W road drivers' timecards to show "down time" while at the Kansas City terminal. He also receives calls from road drivers stuck at weigh stations due to overweights or overlengths. He responds by going to the station and paying the fine. He is reimbursed for these expenditures and he indicated that he did this simply as an accommodation to H&W.

Road driver-city driver contact is minimal. There is a common bulletin board at the facility on which Gofta posts both H&W and Lin Rol notices for road drivers and city drivers, respectively. Road equipment and city equipment are not ordinarily exchanged between road drivers and city drivers. The instances when this occurs is limited to breakdowns, relief duty, and local routing of a full load.

The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment. Whether an employer possesses sufficient indicia of control over petitioned-for employees, employed by another employer, is essentially a factual issue. Thus, for H&W to be found a joint employer of the Lin Rol-supplied employees it must be shown that H&W possesses sufficient indicia of control over those employees, and meaningfully affects matters relating to their employment relationship.

The role played by Terminal Manager Gofta is an important factor in determining whether H&W possesses sufficient indicia of control over the Lin Rol-supplied employees to be found a joint employer. It is undisputed that Gofta is a Lin Rol-provided supervisor who supervises the Lin Rol-supplied employees. These facts, on their face, do not provide a foundation to support joint employer

<sup>&</sup>lt;sup>7</sup> Gofta testified that he had authority to make such decisions on his own but may contact Lin Rol to make them aware of or seek advice on serious matters.

<sup>&</sup>lt;sup>6</sup> The Regional Director found Swift to be nonsupervisory and, therefore, included him in the unit. We denied the Employers' requests for review of this finding.

<sup>&</sup>lt;sup>9</sup> Testimony of H&W's vice president of operations and labor indicated that the H&W directory includes the names and numbers both of persons employed by H&W as well as those of persons not employed by H&W but who may be cartage agents, dray agents, or who may staff call stations utilized by H&W.

<sup>&</sup>lt;sup>10</sup> Boire v. Greyhound Corp., 376 U.S. 473 (1964); NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 1121-1125 (3d Cir. 1982), enfg. 259 NLRB 148 (1981).

status. Nor do we find that the activities Gofta performs on behalf of H&W provide a basis for a joint employer finding. Thus, while Gofta uses H&W business cards, is listed in H&W's directory, pays road drivers' fines, posts H&W notices, and entertains potential H&W clients, these functions suggest that Gofta serves H&W in a representative capacity primarily with respect to business matters. However, Gofta's limited actions, ostensibly as an agent of H&W, are not for the purpose of affecting the employment relationship of the Lin Rol employees. Therefore, Gofta's actions are not indicative of H&W control over Lin Rol employees<sup>11</sup> and are distinct from his day-to-day supervision of the Lin Rol employees on behalf of Lin Rol. Significantly, Gofta's authority to assign work and overtime; grant sick leave or time off; hire, discipline, suspend, and fire employees; and his role to participate in grievance procedures, all stem from his capacity as a Lin Rol supervisor. Gofta reports to and checks with Lin Rol concerning employee employment matters. Gofta does not have to contact or gain permission from H&W to take action relating to labor relations. 12 Additionally, the Lin Rol employees all receive a Lin Rol booklet describing their terms and conditions of employment.

H&W's ability to meaningfully affect matters relating to the employment of the Lin Rol employees is limited. Though, as noted above, H&W requires that Lin Rol employees meet certain standards, and H&W may request the removal of a driver, such powers are of diminished importance when closely examined. The primary employee requirements in the agreement relate to the employee's compliance with safety regulations. H&W's ability to request removal of a Lin Rol city drivers is limited to that driver's assignment by Lin Rol to the H&W facility. On such a request for removal, Lin Rol normally removes the employees from assignment to that customer. If it does not find reason for termination within its company guidelines, it will either reassign the employee to another company or transfer him to another location. H&W cannot request that Lin Rol fire an individual employee. In fact, the terms of the Lin Rol-BRAC collective-bargaining agreement have covered such matters.

Clause three of the Lin Rol-H&W agreement identifies Lin Rol as the employer of the city drivers. As such, it makes all payments of wages and

benefits, and withholds required taxes. While the clause itself is not controlling, the parties have acted in a manner consistent with the identified separation of duties and responsibilities. Thus, H&W concerns itself with the transportation of freight while Lin Rol handles matters relating to the terms and conditions of employment of the petitioned-for employees.

Based on the foregoing, it is clear that Lin Rol through its manager, Gofta, exercises control over the day-to-day labor relations of its employees at H&W's facility and determines, apart from H&W, the terms of the employment relationship. In our view, H&W does not possess sufficient indicia of control, nor does H&W meaningfully affect the employees' employment relationship to a degree to be found a joint employer of the Lin Rol employees. <sup>13</sup> Accordingly, we find the following unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed by Lin Rol Labor Industries, Inc., at the facility located at 4401 Gardner, Kansas City, Missouri, but excluding sales personnel, professional employees, guards and supervisors as defined in the Act.

## DIRECTION

As the employees herein cast their ballots based on the Regional Director's finding that a joint employer relationship existed, we direct that the impounded ballots be discarded and that a new election be conducted should the Petitioner desire to proceed to an election.

The case is remanded to the Regional Director for Region 17 for the purpose of conducting an election pursuant to his Decision and Direction of Election, as modified herein, except that those eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date below.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision on Review and Direction of Elec-

<sup>&</sup>lt;sup>11</sup> See Walter B. Cooke, Inc., 262 NLRB 626, 641-642 (1982); O'Sullivan, Muckle, Kron Mortuary, 246 NLRB 164, 165 (1979).

<sup>12</sup> The present case is distinguishable from *CPG Products Corp.*, 249 NLRB 1164 (1980), cited by the Regional Director. In *CPG* the record revealed that Kenner "exerts substantial control over the day-to-day activities of the drivers leased from Schnabel's." This supported a joint employer finding. In the present case H&W does not exert substantial, nor even meaningful, control over the day-to-day activities of the drivers leased from Lin Rol.

<sup>13</sup> See Laerco Transportation, 269 NLRB 324 (1984); Union Carbide Building Co., 269 NLRB 144, 145 (1984).

tion. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circum-

stances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.